Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the matter of | ) | |
| | ) | ET Docket 92-100 |
| Amendment of the Commission's Rules to Establish | ) | |
| New Personal Communications Services | ) | PP-37, PP-82 |

To: The Commission

**NARROWBAND PCS PIONEER'S PREFERENCE COMMENTS OF BELLSOUTH**

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## SUMMARY

The FCC's procedures for awarding pioneer preferences, as applied in this proceeding, violate the requirements of the Communications Act and the Administrative Procedure Act. The Commission has acknowledged that the award of a pioneer's preference constitutes a guarantee that a license will be ultimately granted to the awardee if the awardee is qualified. In essence, then, the award of a pioneer's preference predetermines whether the public interest will be served by grant of a license. Where substantial and material factual issues exist, Section 309 of the Communications Act provides that this finding cannot be made without some form of adjudicative hearing.

Under the Administrative Procedure Act, the Commission may, in a hearing case, issue a tentative decision and later a final decision, instead of having an administrative law judge issue an initial decision that may be reviewed by the Commission. The APA provides explicit procedures that must be followed in such cases, however. Specifically, the Commission must designate the applications for hearing, give notice of all issues in controversy, allow the introduction of evidence, and permit the filing of proposed findings and conclusions, all before issuance of a tentative decision; in the tentative decision, the Commission must make findings and conclusions on all material issues.

The Commission has not followed any of these procedural requirements. It did not designate the pioneers' preference applications for hearing; it did not specify the issues to be determined; it did not provide an opportunity to present evidence; it did not provide for filing of proposed findings and conclusions; and it did not, in its *Tentative Decision*, make findings and conclusions on all material issues.

Moreover, even the general issues specified in the *Pioneer's Preference* proceeding were not applied consistently here. One critical prerequisite to award of a preference is whether a given proposal led to the rules finally adopted. Since rules have not been adopted here, no party has been given notice of the substance of the issue in controversy, and no party can submit evidence, or findings and conclusions, on this issue until after a final rulemaking decision has been reached, at which time it will be too late, because the adoption of rules will be accompanied by a final decision on the pioneer's preference.

Furthermore, the Commission changed its criteria: the rules for pioneers' preferences permit an applicant to file an experimental application simultaneously with its preference request, while the *Tentative Decision* held that the submission of a technical feasibility showing or experimental results was required at the deadline for filing preference requests.

Accordingly, the *Tentative Decision* is procedurally deficient. The Commission has reached a tentative decision without finding facts or reaching fact-based conclusions, without giving applicants the opportunities to make presentations required by law, and without issuing a designation order giving advance notice of the decisional criteria. Moreover, the Commission's conclusions concerning the application of BellSouth's MobileComm subsidiary are contrary to the factually correct description of the MobileComm proposal contained in an appendix to the *Tentative Decision*. After the issuance of a tentative decision, the burdens are allocated differently from before; a winning applicant no longer needs to demonstrate its entitlement, while the losing applicants have the burden of proof. In the present case, the Commission cannot lawfully issue a final decision awarding and denying pioneers' preferences based on the present procedural posture of the case.

Moreover, the Commission has applied its pioneer's preference criteria here inconsistently with its tentative decision in the "big" low earth orbit satellite proceeding. There, the Commission denied all requests, finding them not to have satisfied the "innovation" requirement because the applicants had merely assembled together technologies that had been previously developed and employed in other cases. Here, it granted the Mtel request, even though Mtel had not developed either a new form of service or a new technology.

Finally, the Commission cannot, consistent with reasoned decisionmaking, award a preference to Mtel while denying the preference requested by MobileComm. MobileComm's proposal is for an advanced verified paging service that is not currently available from any source, while Mtel's proposal is for mobile data service comparable to similar service available from numerous existing sources. Mtel's technology is less advanced than the technology employed for mobile data by others, while MobileComm's is more advanced than other paging technologies. Under these circumstances, the Commission may not rationally make its tentative decision final.

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**NARROWBAND PCS PIONEER'S PREFERENCE COMMENTS OF BELLSOUTH**

BellSouth Corporation, BellSouth Enterprises, Inc., and Mobile Communications Corporation of America (collectively "BellSouth") hereby submit their comments in response to the tentative decision on pioneers' preference requests for narrowband personal communications services ("PCS") contained in the Commission's *Notice of Proposed Rulemaking and Tentative Decision* in General Docket 90-314 and ET Docket 92-100, FCC 92-333, 7 FCC Rcd. 5676 (released August 14, 1992) ("*Tentative Decision*"). Mobile Communications Corporation of America ("MobileComm"), a BellSouth subsidiary, filed a request for a pioneer's preference in ET Docket 92-100 for its Verified Information Paging proposal, File No. PP-82, which was tentatively denied in the *Tentative Decision*. For the reasons stated herein, BellSouth submits that the procedures followed by the Commission in this proceeding violate the Administrative Procedure Act and the Communications Act, and accordingly the Commission may not lawfully grant a pioneer's preference to Mobile Telecommunication Technologies, Inc. ("Mtel"), File No. PP-37, while at the same time denying the request of MobileComm.

Several Commissioners have criticized the pioneer's preference process because there do not appear to be any standards for the award of preferences. Commissioner Barrett has stated:

> I would feel more comfortable with this decision if the distinctions between those tentatively selected and those tentatively denied were more clear, particularly where extensive experimental efforts have occurred. Where distinctions between the entities

> tentatively selected and other entities are not as clear, I question, as a policy matter, whether the Commission should tailor its pioneer preference criteria to the specific characteristics of each docket.[1]

Commissioners Duggan and Marshall have also questioned the reasonableness of the pioneer's preference decisionmaking process.[2] As BellSouth shows herein, there are serious flaws in this process. The *Tentative Decision* regarding narrowband PCS cannot be sustained for the reasons set forth below.

## I. THE PIONEER'S PREFERENCE SCHEME, AS CARRIED OUT IN THIS PROCEEDING, VIOLATES THE ADMINISTRATIVE PROCEDURE ACT AND THE COMMUNICATIONS ACT

The Commission's system for awarding pioneers' preferences, as implemented in this proceeding, will determine which of several applicants will receive exclusive license opportunities after the narrowband PCS rules have been adopted. This procedure will result in a determination whether the public interest, convenience, and necessity will be served by the award of licenses to the various preference applicants on a noncompetitive basis. In making such licensing determinations, the Commission must follow procedures established by Section 309 of the Communications Act[3] and Sections 554, 556, and 557 of the Administrative Procedure Act ("APA").[4] The procedures being followed in ET Docket 92-100 do not comply with these fundamental standards. Accordingly, the Commission may not, consistent with the law, use the current procedures to grant some preference requests and deny others.

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1 *New Personal Communications Services*, Gen. Docket 90-314, *Tentative Decision and Memorandum Opinion and Order*, Separate Statement of Commissioner Andrew C. Barrett (adopted October 8, 1992).

2 *See id.*, Separate Statement of Commissioner Duggan; Commissioner Marshall voiced doubts about the process at the open meeting.

3 47 U.S.C. § 309.

4 5 U.S.C. §§ 554, 556, 557.

### A. The Grant of a Pioneer's Preference Effectively Constitutes the Award of a License, Requiring an Adjudicative Hearing to Determine Substantial and Material Questions of Fact

It is beyond question that the award of a pioneer's preference constitutes, for all effects and purposes, the non-competitive award of a license. In its *Report and Order* adopting the pioneer's preference scheme, the Commission acknowledged this when it stated:

> We believe the most appropriate course of action is *effectively to guarantee the innovating party a license* in the new service (assuming it is otherwise qualified) by permitting the recipient of a pioneer's preference to file a license application without being subject to competing applications.
>
> . . .
>
> The most workable action we can take to reduce the risk [that parties face in the existing rulemaking and hearing procedure] is *effectively to guarantee an otherwise qualified innovating party that it will be able to operate in the new service* by precluding competing applications. . . . We conclude that we have the authority to award such a *dispositive preference.*[5]

The Commission reiterated this conclusion in its *Memorandum Opinion and Order* on reconsideration:

> The pioneer's preference rules provide preferential treatment in the Commission's licensing processes . . . . Under the pioneer's preference procedures, *a party granted such a preference is effectively guaranteed a license* because it is permitted to file a license application without being subject to competing applications.[6]

In short, the award of a pioneer's preference constitutes a Commission determination that the public interest, convenience, and necessity will be served by granting a license to the awardee.

Under Section 309 of the Communications Act, however, before the Commission makes the decision to grant or deny an application, it must determine, on the basis of the record before it, whether there are substantial and material questions of fact. If there are substantial and material

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[5] *Pioneer's Preference*, Gen. Docket 90-217, *Report and Order*, 6 FCC Rcd. 3488, 3492 (1991) (emphasis added), *recon. in part, Memorandum Opinion and Order*, 7 FCC Rcd. 1808 (1992), *pet. for recon. pending.*

[6] 7 FCC Rcd. at 1808 (emphasis added).

questions of fact, or the Commission cannot decide, on the record before it, that the public interest would be served by a grant, it must hold a hearing on the application.[7]

### B. The Commission Has Not Followed the APA's Specific Procedural Requirements for Issuance of Tentative Decisions

Before holding a hearing that will determine action on an application, the Commission is required by Section 309 to give specific notice to the applicant and other parties of the issues to be determined.[8] The Administrative Procedure Act ("APA") provides that evidence may be taken by the Commission itself, in lieu of an administrative law judge,[9] in which case a tentative decision may be issued instead of an initial decision.[10] After the evidence has been taken, and *before* the tentative decision is issued, parties "are entitled to a reasonable opportunity to submit . . . proposed findings and conclusions" and "supporting reasons."[11] In turn, the tentative decision must show the Commission's rulings on each finding or conclusion presented, and must include "a statement of . . . findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record."[12]

The Commission has not complied with any of these precise statutory requirements. It did not designate the pioneer's preference applications for hearing. It did not give notice of the specific issues to be determined in any such hearing. It did not provide for the filing of proposed findings and conclusions. Finally, it did not, in its *Tentative Decision*, state its findings and conclusions "on

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7 47 U.S.C. § 309(a), (d)(2), (e).

8 47 U.S.C. § 309(e) ("The Commission . . . shall forthwith notify the applicant . . . of such [hearing] action and the ground and reasons therefor. . . .").

9 5 U.S.C. § 556(b)(1).

10 5 U.S.C. § 557(b)(1).

11 5 U.S.C. § 557(c)(1), (3).

12 5 U.S.C. § 557(c)(3)(A).

all the material issues of fact, law, or discretion" that were presented on the meager record before it. The Commission's actions in this proceeding violate APA requirements. Thus, the *Tentative Decision* cannot stand.

### 1. No Designation for Hearing

The FCC did not designate the pioneers' preference applications for hearing. Instead, the staff merely issued a series of public notices concerning the applications. An initial group of six requests was placed on public notice for comment on April 30, 1992. This public notice established a comment date of June 1, 1992 and a reply comment date of June 16, 1992.[13] On the same day, the staff issued a second public notice setting June 1, 1992 as the deadline for filing pioneers' preference requests to be included in this proceeding, as well as for filing technical feasibility showings and preliminary experimental results.[14] On June 4, 1992, the staff placed on public notice the group of seven additional pioneers' preference requests filed in response to the foregoing public notice, as well as supplementary materials submitted by four of the initial filers; this last notice established a comment date of June 19, 1992 and a reply comment date of June 29, 1992.[15]

None of these public notices constituted designation for hearing. They were not published in the Federal Register, nor did they "specify[] with particularity the matters and things in issue," as required by Section 309(e) of the Communications Act.[16] The public notices did not state the "time,

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[13] Public Notice, *Requests for Pioneer's Preference Filed*, mimeo 22915 (O.E.T. April 30, 1992).

[14] Public Notice, *Deadline to File Pioneer's Preference Requests: 900 MHz Narrowband Data and Paging (ET Docket No. 92-100)*, mimeo 22922 (O.E.T. April 30, 1992).

[15] Public Notice, *Pioneer's Preference Requests Accepted in ET Docket No. 92-100*, DA 92-712 (O.E.T. June 4, 1992).

[16] 47 U.S.C. § 309(e).

place and nature" of any hearing, the "legal authority and jurisdiction" for the hearing, or the "matters of fact and law asserted," as required by the APA.[17]

Further, the Commission's "sunshine notice" announcing the agenda for the July 16, 1992 public meeting at which the *Tentative Decision* was adopted also did not constitute designation for hearing. That notice merely said that one of the subjects for the July 16, 1992 open meeting would be the adoption of a notice of proposed rulemaking and tentative decision regarding "the implementation of personal communications services and requests for pioneer's preferences."[18] This notice did not even mention the "narrowband data and paging proceeding," the name previously used to describe ET Docket 92-100, except by its docket number, and it did not mention which pioneers' preference requests were to be considered. Although this notice was later published in the Federal Register, it did not give notice of any "hearing" at which evidence could be presented, nor did it specify issues. Indeed, under the Commission's rules, presentations to the Commission are forbidden after a sunshine agenda has been released.[19]

In short, the Commission has taken no action in this proceeding that can be viewed, formally or informally, as a designation for hearing. It has not given the parties any notice of the time or place for submission of evidence respecting the various applicants' pioneers' preference requests, nor has it established procedures for discovery, cross-examination, or other means of developing a factual

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17 5 U.S.C. § 554(b)(1)-(3).

18 Sunshine Act Meetings, *FCC To Hold Open Commission Meeting, Thursday, July 16, 1992*, 57 Fed. Reg. 31,003, 31,003-04 (July 13, 1992).

19 47 C.F.R. § 1.1203(a). *See Tentative Decision*, 7 FCC Rcd. 5676, 5741, ¶ 167:

> The pioneer's preference tentative decisions in this *Notice* constitute restricted adjudicative proceedings. No *ex parte* presentations are permitted until final Commission decisions regarding the preference requests are made and are no longer subject to reconsideration by the Commission or review by any court. In addition, no presentation, *ex parte* or otherwise, is permitted during the Sunshine Agenda period. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1208.

record. While the FCC need not, in licensing cases, conduct a "full-blown, trial-type proceeding," and may instead conduct "paper hearings,"[20] it must nevertheless establish a procedure for developing the factual record that will not prejudice any party.[21] The Commission has established no such procedures and it has taken no steps to initiate an appropriate hearing process.

### 2. No Notice of Issues

More importantly, the Commission has also failed to specify with precision the issues and criteria that will be used to decide the fate of the various pioneers' preference applicants. In an early cellular case, the D.C. Circuit stated the governing legal principle clearly:

> Obviously, it is a fundamental tenent [sic] of the administrative process that parties to comparative proceedings are entitled to notice of the decisional criteria and burdens of proof. As this court has observed:
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> > It is beyond dispute that an applicant should not be placed in the position of going forward with an application without knowledge of requirements established by the Commission, and elementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected.
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> *Bamford v. FCC*, 535 F.2d 78, 82 (D.C. Cir.), *cert. denied*, 429 U.S. 895 . . . (1976). The question is whether that statutory principle was trodden asunder in the proceedings in this case.[22]

Prior to issuance of the *Tentative Decision*, the only notice of the decisional criteria that the Commission gave to the pioneers' preference applicants on how their applications would be judged was the very general guidance given in the *Report and Order* and *Memorandum Opinion and Order* in the Pioneer's Preference proceeding and in Section 1.402 of the Rules. Moreover, the

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[20] *Cellular Mobile Systems of Pennsylvania, Inc. v. FCC*, 782 F.2d 182, 198 (D.C. Cir. 1985) ("*CMS*").

[21] 5 U.S.C. § 556(d).

[22] *CMS*, 782 F.2d at 202. *See also Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1558 (D.C. Cir. 1987); *Radio Athens, Inc. (WATH) v. FCC*, 401 F.2d 398, 404 (D.C. Cir. 1968).

Commission itself recognized that its decisional "standard is not as precise as some may desire."[23] In defense of this imprecision, the Commission stated that "[o]ver time, the Commission's decisions will provide further guidance to those seeking a preference."[24]

To the extent it provides any guidance at all, the applicable rule provides, in relevant part:

> The applicant must demonstrate that it . . . has developed the new service or technology; *e.g.*, that it . . . has developed the capabilities or possibilities of the technology or service or has brought them to a more advanced or effective state. The applicant must accompany its preference request with either a demonstration of the technical feasibility of the new service or technology or an experimental license application, unless an experimental license application has previously been filed for that new service or technology. If the applicant files or has filed an experimental license application, it must specify the area in which it intends to conduct its experiment and whether that is the area for which the preference is sought. In determining in its discretion whether to grant a pioneer's preference, the Commission will consider whether the applicant has demonstrated that it . . . has developed an innovative proposal that leads to the establishment of a service not currently provided or a substantial enhancement of an existing service. Additionally, the preference will be granted only if rules, as adopted, are a reasonable outgrowth of the proposal and lend themselves to the grant of a preference.[25]

This rule gives little guidance to affected parties as to the issues and criteria that will be used to judge the applicants' relative entitlement to pioneers' preferences. It is clearly not sufficiently specific with respect to the last-stated decisional factor — that the rules adopted by the Commission must be "a reasonable outgrowth of the proposal and lend themselves to the grant of a preference."[26]

It is apparent why this factor does not give the applicants adequate notice: ***the applicants do not know — and indeed cannot know — what rules will be adopted.*** Under the Commission's procedures, the pioneer's preference is to be awarded at the same time as rules are adopted, on the

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[23] 6 FCC Rcd. at 3494.

[24] *Id.*

[25] 47 C.F.R. § 1.402(a), *as amended*, 7 FCC Rcd. at 1813.

[26] *Id.*

basis, in part, of whether the rules adopted grew out of any given applicant's proposal, and whether the hitherto unknown rules "lend themselves to the grant of a preference." However, of necessity, until the rules are finally adopted, *none* of the applicants will have any notice of what this critical decisional criterion means.

Under this scheme, the Commission makes up the decisional rules at the same time as it takes final action on the pioneers' preference requests. Accordingly, none of the applicants have any notice of this essential prerequisite to their entitlement until *after* a final award has been made. BellSouth submits that, in the words of the D.C. Circuit, a requisite "statutory principle" of administrative decisionmaking — that the parties are entitled to clear notice of the criteria on which the decision will be based — "was trodden asunder in the proceedings in this case."[27]

In the *Tentative Decision*, the Commission has attempted to sharpen its decisional criteria. In so doing, it effectively rewrote the rule, thereby ensuring that the *Tentative Decision* on the various preference requests was not even based on the general criteria set forth in the rule. The Commission stated:

> Accordingly, in the case of each request before us, we must determine (1) whether the requester has demonstrated that its proposal constitutes a significant communications innovation; (2) whether the requester is the party responsible for the claimed innovation; (3) whether it has made a significant contribution in developing that innovation; and (4) whether the innovation reasonably will lead to establishment of a service not currently provided or substantially enhance an existing service. In making these determinations, we apply the pioneer's preference standards set out in our rules and previously applied in our *Tentative Decision* to award a pioneer's preference to Volunteers in Technical Assistance (VITA). We consider whether a proposal is "to provide either a service not currently provided or a substantial enhancement to an existing service" by evaluating factors that include, but are not limited to, (1) added functionality; (2) new use of spectrum; (3) changed operating or technical characteristics; (4) increased spectrum efficiency; (5) increased speed or quality of information transfer; (6) technical feasibility; and (7) reduced cost to the public. In addition, to be eligible for a tentative award, at the time of the related *Notice* a requester must have obtained an experimental license, commenced its experiment, and reported at least preliminary findings to the Commission that tend

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[27] *CMS*, 782 F.2d at 202.

> to confirm the technical feasibility of its proposal; or alternatively, a requester must have submitted a written showing that demonstrates the technical feasibility of its proposal. . . . Our rules also require that a preference be granted only if the rules that are adopted for application to the new technology or service are a reasonable outgrowth of the proposal and lend themselves to grant of a preference. At the *Notice* stage we consider our proposed rules to be the rules against which a preference request is measured.[28]

Clearly, this does not set forth the same decisional criteria as contained in the rule quoted above that was adopted less than a year earlier. Instead, the Commission decided, in the *Tentative Decision*, to change the criteria defined by its rule to incorporate principles distilled from a tentative decision (*not* a final decision) in an earlier proceeding in a different service. This is hardly reasoned decisionmaking.

Furthermore, while some of the criteria set forth in the *Tentative Decision* are based, at least in part, on the text of the *Report and Order* and *Memorandum Opinion and Order* accompanying adoption of the rule (rather than the rule itself), others are clearly at variance with either the rule or the rationale of the decisions.

For example, the *Tentative Decision* requires preliminary results from an experiment under an experimental license, unless a written technical feasibility showing is submitted.[29] The rule, however, requires only the filing of an application for an experimental license at the same time as the pioneer's preference request is made, *not* that the requester have results from a previously-authorized experiment.[30] On the other hand, in adopting the rule, the Commission stated that "a preference applicant relying on an experiment, rather than a written technical submission, at least must have commenced its experiment and reported to us preliminary results," but it explained its rationale as follows:

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[28] *Tentative Decision*, 7 FCC Rcd. at 5734-35, ¶¶ 147-48 (footnotes omitted).

[29] *Id.*

[30] 47 C.F.R. § 1.402(a), *as amended*, 7 FCC Rcd. at 1813.

> While we recognize that an experimental license applicant may have to wait 90 or more days to have its application approved, there also is a time period between the submission of a preference request and the award of a tentative preference. Therefore, the preference applicant should have ample time to initiate its experiment and obtain at least preliminary results.[31]

In the present case, the Commission distorted this policy beyond recognition. The public notice setting the June 1, 1992 deadline for filing pioneers' preference requests also designated that date as the deadline for submitting experimental *results*,[32] even though the *rule* allows the experimental application to be filed at the same time as the preference request. The Commission compounded its error by adopting its *Tentative Decision* just 46 days after the preference requests were filed, thereby denying applicants such as MobileComm any opportunity to receive a grant of experimental authority, conduct experiments, and submit experimental results.

Moreover, the Commission decided to evaluate the preference requests' conformity with the rules proposed in the notice of proposed rulemaking that was combined with the *Tentative Decision*,[33] rather than evaluating the requests under the rules ultimately adopted, as required under Section 1.402. The Commission has proposed several different alternatives for its rules[34] that effectively nullify this criterion as a basis for decision.

### 3. No Opportunity to File Proposed Findings and Conclusions

The APA specifically provides that "*[b]efore* [issuance of] a . . . tentative decision," parties must be afforded "a reasonable opportunity to submit . . . proposed findings and conclusions."[35] A

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31 7 FCC Rcd. at 1809.

32 Public Notice, mimeo 22922, *supra*.

33 *Tentative Decision*, 7 FCC Rcd. at 5735, ¶ 148.

34 *E.g.*, *id.* at 5697, ¶¶ 51-52.

35 5 U.S.C. § 557(c)(1); *see* 4 Stein, Mitchell, Mezines, ADMINISTRATIVE LAW § 39.03 at 39-22 (1992).

party's proposed findings and conclusions are filed after the close of the evidentiary record.[36] The Commission never initiated a hearing herein and it has never *opened*, much less closed, an evidentiary record. There has not, therefore, been any opportunity for the applicants to file proposed findings and conclusions. The Commission's failure to provide for the filing of proposed findings and conclusions violates the requirements of the APA.

### 4. No Findings and Conclusions on Material Issues

In awarding a tentative preference to Mtel and denying the requests of MobileComm and others, the Commission did not satisfy its obligation to issue findings of fact and conclusions of law on all material and relevant points.

In tentatively granting Mtel's request, the Commission did not make findings or reach conclusions on all of the decisional criteria set forth in its rules, or even those criteria enunciated in the *Tentative Decision* itself. Only a few examples are necessary to prove this point. The Commission did not make any findings as to whether Mtel had shown that its proposal was a "significant communications innovation," was "the party responsible for the claimed innovation," or "made a significant contribution in developing that innovation."[37] While the Commission found Mtel's proposal would "result in new service functionalities," it failed to address the fact that nationwide mobile data service virtually identical to that proposed by Mtel is already available from a number of sources.[38] Furthermore, the Commission did not make any findings of fact concerning the technical feasibility of Mtel's proposal. It also did not make any findings of fact concerning whether its rules were a "reasonable outgrowth" of Mtel's proposal or whether the rules would "lend

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[36] 47 C.F.R. § 1.263(a).

[37] *See Tentative Decision*, 7 FCC Rcd. at 5734-35, ¶ 147.

[38] *See* discussion *infra* at pages 16-18.

themselves to the grant of a preference." In sum, all that the Commission did was draw conclusions, without the factual findings on which the conclusions must be predicated.[39]

In denying MobileComm's preference request, the Commission likewise did not make the necessary factual findings. The Commission's entire discussion of its denial of MobileComm's proposal is as follows:

> Mobile Communications Corporation of America, PP-82, proposes to offer a variety of services that are indistinguishable from those proposed by other requesters. Mobile's request and experimental application do not demonstrate that it has developed the capabilities or possibilities of a specific identifiable PCS technology or service. While Mobile proposes to develop a multi-phase modulation technique to increase spectrum efficiency, it has yet to demonstrate its feasibility through an experiment. Accordingly, we tentatively conclude that Mobile's request should be denied.[40]

No factual findings support these bald conclusions.

Moreover, the first and second sentence of the quoted paragraph are inconsistent with the Commission's factually correct description of MobileComm's proposal contained in Appendix C to the *Tentative Decision*:

> verified transmission of messages, E-mail, and other data without full 2-way capabilities at high data rates.[41]

No other applicant's proposed service is described in "indistinguishable" terms. The Commission's deprecation of MobileComm's proposal as involving "services that are indistinguishable from those proposed by other requesters" is, thud, belied by its own description of the services. In fact, the unique service proposed by MobileComm is clearly a "specific identifiable PCS technology or service."

These are but a few examples of the Commission's failure to comply with the requirements imposed by the APA on the FCC's issuance of its *Tentative Decision*.

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[39] *See Tentative Decision*, 7 FCC Rcd. at 5735-36, ¶¶ 149-51.

[40] *Tentative Decision*, 7 FCC Rcd. at 5738, ¶ 158.

[41] *Id.* at 5760 (Appendix C).

### C. The Commission May Not Lawfully Issue a Final Decision Awarding and Denying Pioneers' Preferences Without Complying With the APA and Section 309 of the Communications Act

If the Commission is to grant and deny pioneers' preference requests, it must do so in a procedurally proper manner: it must designate the applications for some form of hearing; give the applicants notice of the decisional criteria; allow the development of a factual record; provide an opportunity for filing proposed findings and conclusions; and then reach a tentative decision containing findings and conclusions based on the record. The Commission has, in this proceeding, created a procedural nightmare that will prevent it from reaching a final decision without violating the APA, the Communications Act, and fundamental fairness.

When the Commission issues a tentative decision, the posture of a case changes and the burden on the parties is different than before. Before issuance of a tentative decision, each applicant has the burden of introducing evidence supporting its own position, but no applicant receives a presumption that it will receive an award. After a tentative decision, however, the "winner" or "winners" effectively have such a presumption: a tentative decision has been described as "a decision which the agency will make final unless good cause is shown for the agency to adopt a different decision."[42] Accordingly, if the tentative decision is reached without scrupulous attention to fairness and procedural regularity, there is a substantial likelihood that any subsequent decision based on it will also be tainted. In the present case, for example, the issue presented is no longer, "Who is deserving of a preference?", but "Why should the Commission change its tentative decision to award a preference to Mtel alone?" As such, the proceeding's outcome has been tilted in favor of Mtel because of the unlawful procedure followed in reaching what the Commission describes as its tentative decision.

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[42] 4 Stein, Mitchell, Mezines, *supra*, § 39.02[2] at 39-16.

For this reason, a decision to award Mtel a pioneer's preference and to deny the other requests will be subject to searching judicial scrutiny and is likely to be reversed. The Commission cannot fix its error merely by bolstering its tentative decision when it comes time to issue a final decision. If the Commission intends to apply its pioneer preference criteria — however defined — fairly, and grant some requests and deny others, it must vacate its *Tentative Decision* and start anew, in compliance with the requirements of the Communications Act and the APA.

## II. THE FCC HAS APPLIED ITS PIONEER'S PREFERENCE CRITERIA INCONSISTENTLY IN THIS AND OTHER PROCEEDINGS

Just a few weeks after adopting its *Tentative Decision* in this proceeding, and even before it was released, the Commission reached another tentative decision — to award no pioneer's preference to any of the applicants in its "*Big LEO*" proceeding.[43] While that proceeding suffers from many of the same procedural difficulties as the instant proceeding, the Commission there came closer to basing its decision on factual findings, instead of mere conclusions, and the Commission looked beyond the representations of the applicants.

Each of the applicants in the *Big LEO* proceeding appears to have made a more substantial showing on the criteria set forth in the rules that Mtel did in the present proceeding. Moreover, all of the applicants were proposing technologies and services that are not currently available to the public. Nevertheless, the Commission still denied all of the requests.

Constellation, one of the applicants, was found ineligible because its proposal "merely combines existing technologies that it claims as a whole is an innovative achievement," and the Commission found that it had not demonstrated that its proposal was "new or innovative."[44] Ellipsat

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[43] *Mobile-Satellite Service*, ET Docket 92-28, *Notice of Proposed Rulemaking and Tentative Decision*, FCC 92-358 (released September 4, 1992) (*Big LEO*).

[44] *Id.* at ¶ 36.

was also found not to have a "new and innovative" proposal, because "the various techniques . . . already exist in the satellite community and do not demonstrate an innovative contribution on the part of Ellipsat."[45] Loral's application was denied because it offered "nothing new and innovative . . . Loral's system design and spread spectrum technique are not innovations."[46] TRW's request was also found wanting: "Although its high orbiting satellites — resulting in high elevation angles — capitalizes on some of the benefits of higher orbits, we conclude that the TRW approach does not demonstrate an innovation . . . . TRW merely has balanced the relative advantages and disadvantages of low versus geostationary orbits and decided on medium-Earth orbit as the desirable trade-off point. . . . TRW has not demonstrated an innovation beyond current technology . . . ."[47] Similarly, Motorola's request was denied because its "approach does not offer a significant improvement or innovation over the state of the art. We do not find that Motorola's use of crosslink channels or its concept of moving cells and spot beams are particularly innovative or that its overall concept is unique."[48]

Against this decisional standard, the tentative award to Mtel cannot stand. Mtel has proposed a service that is functionally equivalent to the mobile data service that is provided today by a variety of providers.[49] Its multitone modulation technique is many years old, and was developed by others.[50] Its use of "adaptive zoning" is merely a variant on the technique used for registration of

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[45] *Id.* at ¶ 39.

[46] *Id.* at ¶ 43.

[47] *Id.* at ¶ 46.

[48] *Id.* at ¶ 49 (footnotes omitted).

[49] BellSouth's affiliate, RAM Mobile Data, provides such a service; IBM and Motorola jointly offer ARDIS service; and cellular carriers are developing similar services, as well.

[50] Mtel refers to its "enhanced" use of multitone modulation techniques. Accompanying references, dated from 1968 to 1980, reflect the fact that Mtel's modulation technique was developed by others many years ago. (continued...)

cellular units.[51] The Contention Priority Oriented Demand Assignment ("CPODA") protocol that it proposes to use for scheduling reverse transmissions, is not new — it is used in packet satellite service — and Mtel does not claim to be the inventor of this protocol.[52]

Mtel's proposal fails to meet the Commission's criteria in virtually every respect, if the criteria are read stringently. First, its proposal does not constitute a significant innovation. Mtel has not claimed invention of any technology, and its Multi-Carrier Modulation is neither innovative[53] nor particularly spectrally efficient.[54] Mtel has not backed up its claim to have "developed" its multitone modulation technique; the only data provided is a simulation of its technical feasibility performed by an outside laboratory,[55] and, at the time of the tentative award, it had not filed experimental data validating the simulation. Moreover, only a limited number of factors were addressed by the simulation, which did not take into account the effects of both Rayleigh fading and multipath delay, resulting in a highly deficient modeling of a mobile communications channel; further, the testing lab

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[50](...continued)
*See* Mtel's Technical Feasibility Demonstration, ET Docket 92-100, File No. PP-37, at 7 and Tab A at I-17-19 (filed June 1, 1992)

[51] *Compare* Mtel Technical Feasibility Demonstration at 15-16 with the cellular technical standards, OET Bulletin No. 53, at §§ 2.3.4, 2.6.2, 2.6.3.7, 2.6.3.9-11, 3.6.2, 3.7.1.2.3.

[52] Mtel cites "Contention Priority Order Demand Assignment of Resources" as one of its "technological innovations." However, it acknowledges in its technical report that "Contention Priority Oriented Demand Assignment ('CPODA') was developed for packet satellite service." Mtel Technical Feasibility Demonstration at iii, 14 (*citing* Jacobs, et al., [Nov. 1978] PROC. IEEE 1448-67). In describing how CPODA is used for packet satellite service, it states: "CPODA makes provision for a variety of reservations: isolated datagrams, continuing streams, and various priority levels. CPODA also provides for 'piggybacking' additional reservations on previously scheduled transmissions. The goal of these additions is maximizing the responsiveness of the service provided while minimizing the loading on the reservation channel." *Id.* at 14 n. 38.

[53] *See* note 50, *supra*.

[54] Taking into account both data rate and bandwidth, Mtel's spectral efficiency is 0.36-0.48 b/Hz, which compares favorably with both 2400 baud paging (0.096 b/Hz) and ERMES paging (0.250 b/Hz), but is considerably less efficient than the 0.64 b/Hz achieved by the Mobitex technology used by RAM Mobile Data for its mobile data network transmissions.

[55] *See* Mtel Technical Feasibility Demonstration at Tab A.

performing the simulation admitted that it was unable to analyze the performance of orthogonal carrier spacing, a critical aspect of Mtel's technology.[56] In addition, its proposed Nationwide Wireless Network ("NWN") service is not innovative — it is easily matched, if not surpassed, by existing mobile data services, such as RAM Mobile Data's Mobitex.[57] NWN is merely two-way mobile data, not a new use of spectrum.

Essentially, neither the service, nor the components of Mtel's proposal are new or innovative, nor were they developed by Mtel. Mtel has merely developed a way of packaging a lot of concepts together for use in providing two-way mobile data service. In the Big LEO proceeding, the Commission found, however, that merely finding a new application for a few well-known technologies packaged together does not constitute innovation. Accordingly, the tentative award to Mtel of a pioneer's preference is facially inconsistent with the tentative denial of all of the Big LEO applicants.

## III. A GRANT OF A PIONEER'S PREFERENCE TO MTEL, PAIRED WITH DENIAL OF MOBILECOMM'S REQUEST, WOULD CONSTITUTE UNREASONED DECISIONMAKING

The tentative decision to award Mtel's request, while denying MobileComm's, would, if carried to final decision, constitute unreasoned decisionmaking. Mtel has, as discussed in the foregoing section, taken a variety of well-established techniques and packaged them together to provide a nationwide mobile data service. If the Commission concludes that Mtel's packaging of existing components to provide its customers with enhanced functionality is innovative, it must conclude that MobileComm's proposal is deserving of a pioneer preference, too.

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[56] *See id.* at Tab A, I-1, II-1.

[57] Mtel's spectral efficiency is lower than Mobitex (0.36 b/Hz vs. 0.64 b/Hz); its maximum number of users is less; its channel width is greater; and both services provide two-way, high-speed, error-free data transfer, full two-way functionality, and verification of message receipt.

MobileComm has provided a truly innovative and unique service. Mtel's proposal is merely a mobile data service similar to other offerings currently available. MobileComm's VIP system can provide a paging user with the same functions as a conventional paging service but it is more technically advanced and effective in how it implements those functions. The increased bit rate resulting from the modulation technique used in VIP will make basic paging service far more spectrally efficient.[58] The autonomous registration of the user terminal permits different pages to be sent at the same time from base stations in a simulcast system, further increasing spectral efficiency.

VIP service uniquely "fills the gap" between pure two-way and one-way services; it efficiently meets the need for verified transmission of one-way messages.[59] VIP is truly a new alternative and is deserving of a pioneer's preference.

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[58] Mtel's spectral efficiency is 0.30 b/Hz, an efficiency 3.125 times that of 2400 bps paging and 20 percent higher than ERMES.

[59] For example, a system such as Mtel's, designed for two-way data transmission, would be capable of providing verified paging service, but the designer of a two-way system will make different design choices that make one-way verified paging service less efficient or reliable. For example, Mtel chose not to utilize autonomous registration in order to reduce the burden on the reverse channels from registration traffic. This might be a reasonable approach for a two-way data network, given that the reverse channel would be expected to carry significant user-originated traffic. However, Mtel's decision to forego autonomous registration could result in a need for a higher ratio of repeated transmissions, including nationwide transmissions, because of a terminal's unknown location.

## CONCLUSION

For the foregoing reasons, BellSouth submits that the Commission's procedures for awarding pioneers' preferences are unlawful as implemented in this proceeding, and the *Tentative Decision* should be vacated.

Respectfully submitted,

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November 9, 1992.

**CERTIFICATE OF SERVICE**

I, David G. Richards, hereby certify that on November 9, 1992, a copy of the foregoing "Comments" was served by United States Mail, postage prepaid to the parties on the attached list, unless otherwise noted.

David G. Richards

David G. Richards